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No. 84-1756

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CITY OF SHEPHERDSVILLE,
KENTUCKY,
BEN STILLWELL - - - - - - Petitioners

versus

PAUL DALE RYMER - - - - - Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENT

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IN THE

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No. 84-1756

CITY OF SHEPHERDSVILLE, KENTUCKY,
BEN STILLWELL - - - - - - *Petitioners*

v.

PAUL DALE RYMER - - - - *Respondent*

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, Paul Dale Rymer, offers this Brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

COUNTERSTATEMENT OF THE CASE

This is a civil rights action originally brought by Paul Dale Rymer against the City of Shepherdsville, Kentucky, Ben Stillwell, and numerous other Defendants pursuant to 42 U.S.C. §1983.

On June 13, 1979, Paul Dale Rymer participated in a convoy on Interstate 65 near Shepherdsville, Kentucky. The convoy was stopped by law enforcement officials of the state of Kentucky, the City of Shepherdsville, the City of Lebanon Junction, and Bullitt County. Rymer and three other truck drivers were arrested. Officer Ben Stillwell beat and kicked Rymer violently

about the head, chest and back during the arrest. Rymer was treated by an emergency medical technician who recommended that Rymer be taken to a hospital for x-rays. Stillwell rejected this recommendation. Evidence of the injuries suffered by Rymer included photographs and the testimony of Rymer, the jailer, and the Bullitt County Sheriff. Rymer and others were jailed for the night. The next morning the arrested individuals were taken to the County Court to enter their pleas. They were then released.

Rymer subsequently filed a complaint in the United States District Court for the Western District of Kentucky under 42 U.S.C. §1983. The Complaint named numerous defendants. The District Court dismissed the Complaint as to some of the Defendants and directed a verdict as to the other Defendants except Officer Stillwell and the City of Shepherdsville. The jury returned a verdict against Stillwell for $32,000 as compensatory damages and $50,000 as punitive damages, and against the City of Shepherdsville for $25,000 as compensatory damages. A judgment was entered upon that verdict on May 26, 1983. The Defendant's motions for both a new trial and judgment notwithstanding the verdict were denied. The United States Court of Appeals for the Sixth Circuit affirmed in *Rymer* v. *Davis,* 754 F. 2d 198 (1985), which is reprinted in the appendix to this Brief in Opposition. (Appendix, at 3a-9a.)

In Petitioner's Statement of the Case, at the bottom of page 4, the Petitioner would have this Honorable Court believe that the police officers had always ad-

mitted Rymer was injured and received his injuries at the scene of his arrest. The trial posture and defense strategy of the Petitioner at the trial in the District Court was vastly different. All Defendants' witnesses and all Defendants denied Rymer was beaten and stated they did not see anyone strike him. (See page 22 of the Petition for Writ of Certiorari.) This new position herein is new and novel since at the trial Stillwell and all of his witnesses denied beating Rymer or seeing Rymer beaten, even when photographs of head injuries and long red marks across his chest, back and buttocks were presented in evidence.

Accordingly, as briefed and argued in the Court of Appeals, the jury had mutually exclusive sets of testimony from which to make a determination and quite simply did not believe the Petitioner, Stillwell, or any of his fellow officers or witnesses.

To this day, Rymer remains subject to prosecution on numerous other charges placed by Petitioner, Stillwell, as an officer of the City of Shepherdsville.

I. The Theory of Liability Under Which This Case Was Submitted to the Jury Was That the City of Shepherdsville Trained Its Police Officers in a Way That Was So Reckless or Grossly Negligent That Future Police Misconduct Was Almost Inevitable or Substantially Certain to Result.

The issues raised by the Petitioner simply ignore the instructions given by the District Court which were in conformity to the proof. Not only did the trial court follow *Hays* v. *Jefferson County,* 668 F. 2d 869

(6th Cir. 1982), cert. denied, 103 S. Ct. 75 (1983), it further narrowed Rymer's chances of recovery by defining gross negligence as "a failure to exercise even the *slightest* care." (Emphasis added)

Rymer's claim is grounded upon the City's failure to properly train its police officers. The case was submitted to the jury on instructions carefully drawn in conformity with *Hays*. The jury was instructed that it should find for the Plaintiff, Rymer, if it found by a preponderance of the evidence that the City trained its police officers in a way that was so reckless or grossly negligent that future police misconduct was almost inevitable or substantially certain to result. Rymer established that, at the time of the incident, the City had no rules or regulations governing its police force. Rymer further proved that, after hiring, the City required the officers to complete 40 hours of training each year. However, none of the training received by Officer Stillwell instructed him on arrest procedures or treatment of injured persons. The City gave its officers carte blanche authority to use their own discretion in the arrest and treatment of persons suspected of criminal activity.

The theory of recovery was and is sound. In *Hays,* the 6th Circuit Court of Appeals held that "a municipality may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable . . . or would properly be characterized as substantially certain to result. . . ." 668 F. 2d at 874.

The Court of Appeals interpreted *Monell* v. *Department of Social Services,* 436 U. S. 658 (1978) to hold that a municipal custom that authorizes or condones police misconduct can be inferred when the municipality has failed to train or has been grossly negligent in training its police force. To prevail against the City, Rymer had to show that he was deprived of a constitutional right either as a result of a "policy statement, ordinance, regulation, or decision adopted or promulgated by the City's governing body" or as a result of a "governmental custom even though such a custom had not received formal approval through the City's official decision-making channel." The jury obviously believed Rymer met this burden of proof.

II. The United States Court of Appeals for the Sixth Circuit Did Not Commit Error in Affirming the Judgment of the District Court.

The Petitioner contends that the amount of the verdict was excessive.

Awards of compensatory and punitive damages shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness, *Smith* v. *Heath,* 691 F. 2d 220, 226 (6th Cir. 1983). Accordingly, the question of excessiveness of the jury's award of damages is primarily for the trial court and is not reviewable on appeal in the absence of an abuse of discretion.

The Petitioner does not dispute the punitive damage award against Stillwell. The trial judge instructed

the jury, in conformity with *Smith* v. *Wade*, — U. S. — 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983), that it could award Rymer punitive damages if Stillwell acted "in a reckless or callous disregard of or indifferent to the rights of one or more persons, including the injured person (Rymer)."

CONCLUSION

42 U.S.C. §1983 serves basically two functions. First, it deters future governmental actions that violate a person's civil rights. Second, it compensates the injured party. Based upon Paul Dale Rymer's substantial and continuing injuries and the finding of liability against both Stillwell and the City of Shepherdsville for violation of federally protected civil rights, Rymer is entitled to the award of damages awarded him by the District Court and affirmed by the U. S. Court of Appeals for the Sixth Circuit. Otherwise the principles and policies of 42 U.S.C. §1983 would be subverted.

The Petitioner complains and argues that the Court of Appeals has misconstrued the law in deciding this case. The Court of Appeals did not decide this case. This case was decided by a properly and adequately instructed jury who rendered a verdict which was properly incorporated into a judgment of the District Court for the Western District of Kentucky and properly affirmed by the United States Court of Appeals for the Sixth Circuit.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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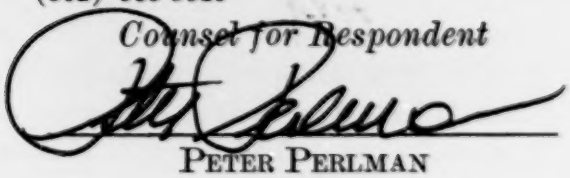

PETER PERLMAN

CERTIFICATE OF SERVICE

I, Peter Perlman, a member of the Bar of this Court, representing the Respondent herein, do hereby certify that I have this 7th day of June, 1985, served the foregoing Brief in Opposition to Petition for Writ of Certiorari pursuant to Rule 28.3 of this Court upon all parties required to be served to wit: Hon. Mark E. Edison, by depositing three (3) copies of said Brief in Opposition in a United States mailbox with first class postage prepaid, addressed to Hon. Mark E. Edison, Porter & Edison, 217 Buckman Street, Shepherdsville, Kentucky 40165.

PETER PERLMAN
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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5586

PAUL D. RYMER, - - - - *Plaintiff-Appellee,*

v.

TROOPER H. A. DAVIS, et al., - - - *Defendants,*
CITY OF SHEPHERDSVILLE, KENTUCKY,
AND BEN STILLWELL, - - *Defendants-Appellants.*

On Appeal from the United States District Court for the Western District of Kentucky

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JUDGMENT — Filed February 11, 1985

Before: KEITH and JONES, Circuit Judges; and POTTER, District Judge.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendants-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk
John P. Hehman, Clerk

Issued as Mandate: March 5, 1985

Costs: None

Filing fee .....$
Printing .....$
Total .....$

A True Copy

Attest:

/s/ Audrey Corbett
Deputy Clerk

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-5586

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL D. RYMER, - - - - *Plaintiff-Appellee,*

v.

TROOPER H. A. DAVIS, et al., - - - *Defendants,*

CITY OF SHEPHERDSVILLE, KENTUCKY, AND BEN STILLWELL, - - *Defendants-Appellants.*

On Appeal from the United States District Court for the Western District of Kentucky

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Decided and Filed February 11, 1985

Before: KEITH and JONES, Circuit Judges; and POTTER, District Judge.*

JONES, Circuit Judge. This appeal presents the issue of whether a city may be liable under 42 U.S.C. §1983 (1982) when the city has failed to train its police officers or has trained its police officers in a way that was so reckless or grossly negligent that future police misconduct is almost inevitable or substantially certain to result. We hold that under the circumstances of this case, it was not error to find the city liable for such a failure.

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*The Honorable John W. Potter, District Judge, United States District Court for the Northern District of Ohio, sitting by designation.

On June 13, 1979, Paul Dale Rymer participated in a convoy on an interstate in Kentucky. The convoy was stopped by law enforcement officials of the State of Kentucky, the City of Shepherdsville, the City of Lebanon Junction, and Bullitt County. Rymer and three other truck drivers were arrested. Officer Ben Stillwell beat and kicked Rymer violently during the arrest. Rymer was treated by an emergency medical technician who recommended that Rymer be taken to a hospital. Officer Stillwell rejected this recommendation. Rymer and the others were jailed for the night. The next morning the arrested individuals were taken to the county court to enter their pleas. They were then released.

Rymer subsequently filed a complaint in the district court under 42 U.S.C. § 1983. The complaint named numerous defendants. The court dismissed the complaint as to some of the defendants and directed a verdict as to the other defendants except Officer Stillwell and the City of Shepherdsville (City). The jury returned a verdict against Stillwell for $32,000 as compensatory damages and $50,000 as punitive damages and against the City for $25,000 as compensatory damages. A judgment was entered upon that verdict on May 26, 1983. The defendants' motions for both a new trial and judgment notwithstanding the verdict were denied. Both defendants appeal and argue that the amount of the award is excessive. Further, the City argues that the district court erred by not dismissing the City prior to submitting the case to the jury and, alternatively, argues that its motion for judgment notwithstanding the verdict should have been granted.

The City's contention must be treated as a request for a new trial because the City did not move for a directed verdict and, therefore, judgment notwithstanding the verdict in favor of the City would have been inappropriate. A party against whom a verdict is rendered must comply

with Federal Rule of Civil Procedure 50 to obtain appellate review of a claim that he is entitled to judgment as a matter of law. If a party moves for judgment notwithstanding the verdict after having failed to move for a directed verdict at the close of the evidence, an appellate court cannot order judgment for him. Fed. R. Civ. P. 50(b); *see Trotter* v. *Todd,* 719 F. 2d 346, 350 (8th Cir. 1983). If the evidence was insufficient as a matter of law, however, the court can order a new trial. C. Wright & A. Miller, Federal Practice and Procedure §§ 2537, 2540. Because the City is arguing that the evidence was insufficient as a matter of law, we will treat the City's argument as a request for a new trial.

The evidence viewed most favorably to the non-moving party, Rymer, showed that during Rymer's arrest, Stillwell beat and kicked Rymer many times and hit Rymer once in the stomach and head with a nightstick. Stillwell refused to accept an emergency medical technician's suggestion that Rymer needed x-rays. Evidence of the injuries included photographs and the testimony of Rymer, the jailer, and the Bullitt County Sheriff. The evidence further showed that, at the time of the incident, the City had no rules or regulations governing its police force. Nor did the City require any pre-employment training. The initial training received by the officers was on-the-job training. Although the City required the officers to complete forty hours of training each year after being hired, none of the training received by Officer Stillwell instructed him on arrest procedures or treatment of injured persons. The City's police officers used their own discretion in the arrest and treatment of persons suspected of criminal activity.

The theory of liability put before the jury in this case was that it should find for the plaintiff, Rymer, if it found by a preponderance of the evidence that the City trained its police officers in a way that was so reckless or grossly negligent that future police misconduct was almost in-

evitable or substantially certain to result. This theory of liability conforms to our decision in *Hays* v. *Jefferson County,* 668 F. 2d 869 (6th Cir. 1982), *cert. denied,* 103 S. Ct. 75 (1983). In *Hays,* we held that "a municipality may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable . . . or would properly be characterized as substantially certain to result . . ." *Id.* at 874 (citations omitted). *Hays* has since been questioned by a number of courts because of our failure to recognize negligence as a basis for liability of supervisory officials and municipalities. *Branden* v. *Allen,* 719 F. 2d 151, 153-54 (6th Cir. 1983); *Lopez* v. *Ruhl,* 584 F. Supp. 639, 649 & n.7 (W. D. Mich. 1984); *Means* v. *City of Chicago,* 535 F. Supp. 455, 462 (N.D. Ill. 1982); *see also Hirst* v. *Gertzen,* 676 F. 2d 1252, 1263 (9th Cir. 1982). Because the district court instructed the jury on gross negligence, we are not presented with the question of negligence as a basis for liability.

We are, however, presented with the question of whether the City's failure to train its police officers regarding arrest procedures was a proper basis for liability. In *Monell* v. *Department of Social Services,* 436 U. S. 658, 694 (1978), the Supreme Court held that a municipality may be held liable under section 1983 if either a municipality's official policy or one of its customs is the source of the injury. The Court noted that the case unquestionably involved official policy and that it, therefore, had no need to address the full contours of municipal liability under section 1983. *Id.* at 694-95.

To prevail against the City, Rymer had to show that he was deprived of a constitutional right either as a result of a "policy statement, ordinance, regulation, or decision adopted and promulgated by the City's governing body" or as a result of a "governmental 'custom' even though such a

custom' had not received formal approval through the City's official decisionmaking channels." *Williams* v. *Butler*, 746 F. 2d 431, 435 (8th Cir. 1984) (quoting *Monell*, 436 U. S. at 691). In *Hays*, 668 F. 2d at 874, this Court joined a number of courts that have interpreted *Monell* to hold that a municipal custom that authorizes or condones police misconduct can be inferred when the municipality has failed to train or has been grossly negligent in training its police force.[1] *See, e.g., Herrera* v. *Valentine*, 653 F. 2d 1220, 1224 (8th Cir. 1981); *Owens* v. *Haas*, 601 F. 2d 1242, 1246-47 (2d Cir.), *cert. denied*, 444 U. S. 980 (1979); *Popow* v. *City of Margate*, 476 F. Supp. 1237, 1245-46 (D. N. J. 1979); *Leite* v. *City of Providence*, 463 F. Supp. 585, 590-91 (D. R. I. 1978); *see also Means* v. *City of Chicago*, 535 F. Supp. 455, 462-63 (N. D. Ill. 1982). Further, we implicitly agreed with the Second Circuit, *Owens*, 601 F. 2d at 1246-47, that official acquiescence may be inferred from the lack of training even in the fact of only a single brutal incident of police misconduct. *Hays*, 668 F. 2d at 870-71, 874; *see also Leite*, 463 F. Supp. at 590. *Contra Gilmere* v. *City of Atlanta*, 737

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[1]The type or amount of training necessary to avoid the inference of a custom that authorizes or condones police misconduct is properly a jury question. We note, however, that numerous resources are available to municipalities to guide them in supervising police officers and in preventing instances of police brutality. *See e.g.*, George C. Edwards, *The Police on the Urban Frontier: A Guide to Community Understanding* (1968); Report of the National Advisory Commission on Civil Disorders (1968); D. Hanna, *A Guide to Primary Police Management Concepts* (1971); Institute on Police Management for Supervisory and Administrative Personnel, *Police Management for Supervisory and Administrative Personnel* (1963); L. O'Donnell, *Deadly Force: The True Story of How a Badge Can Become A License to Kill* (1983); L. O'Leary, The Selection and *Promotion of the Successful Police Officer* (1979); H. Russell, *Understanding Human Behavior for Effective Police Work* (1976); P. Whisenand, *The Effective Police Manager* (1981).

F. 2d 894, 904 (11th Cir. 1984); *Languirand* v. *Hayden*, 717 F. 2d 220, 227 (5th Cir. 1983).

It is not enough, however, that the plaintiff demonstrate a general failure to train. There must exist a causal relationship between the failure to train and the conduct of the police officer. *See Means* v. *City of Chicago*, 535 F. Supp. 455, 462 (N. D. Ill. 1982) (while evidence of a failure to provide crowd control training might be relevant to a charge of overreaction to crowd hostility, it would have no bearing on an incident involving a single victim). In the instant case, the plaintiff proved that the City had a custom of allowing its police officers to determine when and how to arrest without the benefit of supervisory regulations. The City gave its officers carte blanche authority to do as they wished during an arrest. *See Williams* v. *Butler*, 746 F. 2d 431 (8th Cir. 1984) (city had custom of giving judges carte blanche authority in making personnel decisions and are liable for constitutional injuries arising therefrom). Further, Officer Stillwell had received no training on arrest procedures or the treatment of injured persons. The City's failure to train its police officers and the City's bestowal of carte blanche authority to its police officers were directly related to the ultimate abuse Rymer received during the arrest. Consequently, Rymer had introduced sufficient evidence to go to the jury. The jury obviously concluded that the training received by Stillwell, or the lack of it under the circumstances, was so reckless or grossly negligent that future police misconduct was almost inevitable or substantially certain to result. Because this finding is supported by the evidence, we uphold the jury verdict.

Both the City and Stillwell argue that the amount of the verdict was excessive. We disagree with the contention that "the trial court abused its discretion by granting an award so large as to shock the judicial conscience," *Thomp-*

son v. *National Railroad Passenger Corp.*, 621 F. 2d 814, 827 (6th Cir.), *cert. denied*, 449 U. S. 1035 (1980) and thus do not so find.

Accordingly, the judgment below is AFFIRMED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0309 L(A)

PAUL DALE RYMER

v.

MIKE NALLEY
LANNY BAKER
CITY OF SHEPHERDSVILLE, KENTUCKY
BEN STILLWELL
CITY OF LEBANON JUNCTION

JUDGMENT

This action having been tried before a jury on May 23, 24, 25, 1983, the Court having ruled on the motions of counsel, and the Jury having returned its verdict on May 25, 1983,

IT IS ORDERED AND ADJUDGED that this action be and it is hereby DISMISSED as against defendants City of Lebanon Junction, Kentucky, Mike Nalley, and Lanny Baker.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff recover from the defendant Ben Stillwell $32,000.00 as compensatory damages and $50,000.00 as punitive damages, together with interest at the rate of 8.72 per cent until date of payment.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff recover from the defendant City of Shepherdsville, Kentucky, $25,000.00 as compensatory damages, together with interest at the rate of 8.72 per cent until the date of payment.

IT IS FURTHER ORDERED AND ADJUDGED that costs shall be paid by the defendants Stlilwell and City of Shepherdsville, Kentucky.

This is a final and appealable judgment and there is no just cause for delay.

May 26, 1983

(s) Charles M. Allen
Charles M. Allen, Chief Judge
United States District Court

Copies to counsel